BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KATHRYN L. WHITFORD	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,053,809
WINFIELD LAUNDRY & CLEANERS	)	
Respondent	)	
AND	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the February 3, 2011, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes (ALJ).

Claimant appeared by her attorney, W. Walter Craig of Derby, Kansas. Respondent and its insurance carrier appeared by their attorney, Matthew J. Schaefer of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the discovery deposition of Kathryn Lynne Whitford taken January 10, 2011; the transcript of Preliminary Hearing held January 25, 2011, with attachments; and the documents filed of record in this matter.

ISSUES

Claimant injured her left ankle on October 8, 2010, when she fell in respondent's parking lot while walking her manager's wife to her car. The ALJ found the accident arose out of and in the course of claimant's employment with respondent and, therefore, ordered payment of outstanding medical bills.

Respondent contends the ALJ erred as claimant was engaged in horseplay at the time of the accident and, therefore, her accident did not arise out of her employment. In its brief to the Board, respondent argues claimant's accident resulted from foolhardy actions" during a "moment of frivolity" while "over come [*sic*] by whimsy,"[1] which was "motivated by either playfulness or silliness". In any event, respondent maintains that claimant had stepped away from her work duties at the time of her accident and, therefore, the Board should deny her request for workers compensation benefits.

Claimant, on the other hand, requests the Board to affirm the preliminary hearing Order. Claimant contends she slipped on loose gravel and, therefore, her accident occurred due to the condition and disrepair of respondent's parking lot. Accordingly, claimant argues her accident resulted from a workplace hazard or risk incidental to her employment. In addition, claimant asserts that she was not engaged in horseplay at the time of her accident as she merely made an instantaneous playful gesture to her boss.

The only issue before the Board on this appeal is whether claimant's accident arose out of her employment with respondent.

FINDINGS OF FACT AND CONCLUSION OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds and concludes:

Respondent is a laundry and dry cleaning establishment. Claimant, who is 60 years old, is employed by respondent as a front desk clerk who greets and assists customers.

The facts are not in dispute. On October 8, 2010, claimant fell and fractured her left ankle while she was walking her manager's wife to her car in respondent's parking lot. At the preliminary hearing, claimant described the accident, as follows:

> . . . I had a moment to step outside and I was talking with the manager's wife. And at the same time we just walked a short distance at the same time the manager was exiting the parking lot. And he was coming toward us in a, well, anyway, I turned around and I went like this (indicating), and went back to talking to the manager's wife, and I just slipped.[2]

At her earlier deposition, however, claimant provided additional details surrounding her fall. She initially testified she slipped on gravel after she had playfully motioned or gestured to her manager to stop. The record does not clearly describe the pose that

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[1] Respondent's Brief at 5.

[2] P.H. Trans. at 10-11.

claimant assumed but claimant acknowledges that she had also lifted her left foot. She testified, in part:

> If I would have been standing straight up, standing straight up and not doing anything and just wave to him as he was going past us, but I was standing up, and I raised my left foot and was probably looking like a ballerina, and I just slid on one foot.[3]

As indicated above, the question on this appeal is whether claimant's accident arose out of her employment. Before an accident is compensable under the Workers Compensation Act (Act), the accident must, among other things, arise out of the employment.[4] The phrase "arising out of" implies some causal connection between the accidental injury and the employment; namely, the injury must originate from the nature, conditions, obligations or incidents of the employment. In *Coleman*, the Kansas Supreme Court summarized these concepts, as follows:

> We first observe that the Workers Compensation Act covers only personal injuries "by accident arising out of and in the course of employment." K.S.A. 2005 Supp 44-501. The phrase "in the course of" employment relates to time, place, and circumstances under which the accident occurred, and requires that the injury happen while the employee is at work in his or her employer's service. *Siebert v. Hoch,* 199 Kan. 299, Syl. ¶ 2, 428 P.2d 825 (1967). . . .
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> The phrase "arising out of' implies some causal connection between the accidental injury and the employment. *Rush v. Empire Oil & Refining Co.,* 140 Kan. 198, Syl. ¶ 1, 34 P.2d 542 (1934). An injury is compensable if it arises out of the "nature, conditions, obligations and incidents of the employment." *Siebert v. Hoch,* 199 Kan. 299, Syl. ¶ 4, 428 P.2d 825 (1967).[5]

And whether an accident arises out of and in the course of employment is a question of fact.[6]

Generally, injuries from horseplay are not compensable under the Act as they do not arise out of the employment or the worker's assigned duties. The Kansas Supreme

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[3] Claimant's Depo. at 20-21.

[4] See K.S.A. 2010 Supp. 44-501(a).

[5] *Coleman v. Armour Swift-Eckrich*, 281 Kan. 381, 383, 130 P.3d 111 (2006).

[6] *Douglas v. Ad Astra Information Systems,* 42 Kan. App. 2d 441, Syl. ¶ 5, 213 P.3d 764 (2009).

Court has long held that horseplay in the workplace is not compensable under the Act. In *Neal*, the Court held:

> An accidental injury suffered by an employee as the result of a sportive act or "horseplay" in which he was voluntarily engaging and which was unrelated to the work he was employed to perform, is not an injury "arising out of" the employment and is therefore not compensable under the act.[7]

The Act does not define horseplay. *Webster's,* however, defines the term as "[r]owdy or unruly behavior."[8] A quick review of appellate decisions indicates that the term horseplay has been used in conjunction with the terms pranks, sportive acts, practical jokes, boisterous behavior, and skylarking. In short, horseplay means different things to different people. Moreover, this case exemplifies that it is sometimes difficult to determine where horseplay ends and mere thoughtlessness begins.

As indicated above, claimant argues that her conduct at the time of the accident did not rise to the level of horseplay. The analysis, however, is not whether claimant's gesture comprises horseplay but, instead, whether claimant's accident arose out of her employment. And when making that analysis in this claim, one must consider (1) whether claimant had sufficiently stepped away from her work duties to render her accident outside of her employment and (2) whether the condition of respondent's premises contributed to her accident.

When considering the entire record, the undersigned finds claimant's accident arose out of her employment. First, while claimant was walking to the parking lot with her manager's wife, gesturing to her manager was not a sufficient deviation from her work duties to comprise an abandonment of her employment. Second, claimant slipped upon loose gravel in the parking lot; therefore, the condition of respondent's premises contributed to the accident.

In summary, the undersigned Board Member affirms the ALJ's finding that claimant's accident arose out of her employment. Consequently, the preliminary hearing Order should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

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[7] *Neal v. Boeing Airplane Co.*, 161 Kan. 322, Syl. ¶ 4, 167 P.2d 643 (1946).

[8] *Webster's II New Riverside University Dictionary* (1994) at p. 593. Houghton Mifflin Company.

[9] K.S.A. 44-534a.

as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

DECISION

WHEREFORE, the undersigned Board Member affirms the February 3, 2011, Order entered by Administrative Law Judge Nelsonna Potts Barnes.

IT IS SO ORDERED.

Dated this ____ day of April, 2011.

HONORABLE GARY M. KORTE

c: W. Walter Craig, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge